(14th Edn.) at page 336, paragraph 268, where a member of a Joint Family governed by the Mitakshara Law sells or mortgages *more than his own interest* in the Joint Family property, the alienation not being one for legal necessity or for payment by a father of an antecedent debt, the other members or persons to whom their interest in the property have passed, are entitled to have the alienation set aside *to the extent of their own interest therein.* In this case the karta transferred the whole of the land to the appellant who is entitled to retain his own one-third share in the property and may or may not be entitled to retain the deceased karta's share, but he is certainly not entitled to retain the one-third share which rightly belongs to the respondent as the third coparcener.

With regard to the learned trial judge's decision as to the karta or his estate being entitled to one-third share in the land, with respect, there would appear to be no alternative but to set it aside in the present case.

For the reasons I have stated I would allow the appeal to the extent that the reference in the learned trial judge's declaration to the karta or his estate be deleted, that the consequential orders be amended to provide for sale of the land by public auction and payment out of the proceeds of sale of the respondent's one-third share, but that the orders for accounts and inquiry do stand. In all the circumstances of the case the respondent must pay one-third of the appellant's costs of this appeal and in the court below.

Syed Othman F.J. and **Abdul Hamid J.** concurred.

Order accordingly.

Solicitors: *Lovelace & Hastings; Gill & Tang.*

PUBLIC PROSECUTOR v. NG GOH WENG & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman, Chang Min Tat and Syed Othman F.JJ.) September 7 and October 10, 1978]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1978]

Criminal Law and Procedure — Preliminary Inquiry — Admissibility of statement recorded under s. 113 of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether preliminary inquiry a trial — Whether duty of Magistrate to decide as to its admissibility — Evidence Act, 1950, s. 26 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 113, 138, 139, 140 and 173.

Evidence — Admissibility of confession to police officer — Criminal Procedure Code (F.M.S. Cap. 6), s. 113 — Evidence Act, 1950, s. 26.

The three accused in this case were tentatively charged with murder and a preliminary inquiry was held before the Senior President of the Sessions Court in Penang. A cautioned statement by the third accused to a Police Inspector was admitted at the preliminary inquiry. On application by counsel for the third accused the learned judge of the High Court called for the record of the case and after hearing arguments he ruled that the cautioned statement was not admissible at the preliminary inquiry although it would be admissible at the trial in the High Court, ([1978] 2 M.L.J. 74). The Public Prosecutor applied to the High Court to reserve the following questions of law for the decision of the Federal Court —

1. Whether a statement recorded in accordance with section 113 of the Criminal Procedure Code which was intended to be produced at a trial before the High Court in support of the case for the prosecution was in law admissible at the preliminary inquiry?
2. If the answer to question 1 was in the affirmative, whether it was the duty of the Magistrate in law to decide on its admissibility.

Held: (1) the answer to the first question was in the affirmative. The context in which the word "trial" was used in section 113 of the Criminal Procedure Code requires that the court should give it an extended meaning to include a preliminary inquiry. It is absurd to suppose that evidence inadmissible at a preliminary inquiry was admissible in a trial before the High Court. *A fortiori* evidence admissible at a trial was admissible at a preliminary inquiry;

(2) if clearly the statement recorded under section 113 of the Criminal Procedure Code was made to an officer below the rank of Inspector, then the duty of the committing Magistrate was easy — he could simply reject it. But if the voluntariness of the statement were challenged and in the unlikely event of the accused's counsel persisting in having a trial within a trial, the learned Magistrate's duty was to listen patiently to the evidence and submission by both sides, and if there were doubt as to the weight and quality of the evidence, he should refrain from assessing the evidence and instead simply commit the accused and leave the duty of resolving the doubt to the High Court judge.

Cases referred to:-

(1) *Re Low Kuan Meng* [1962] M.L.J. 265.

(2) *Re Osman bin Abdullah* [1954] M.L.J. 237.

(3) *In re Bai Parvati* (1911) I.L.R. Bom. 163, 168.

The following case was also cited in argument: *Liew Wah Ming* v. *Public Prosecutor* [1963] M.L.J. 82.

FEDERAL COURT.

Haidar bin Mohamed Noor (State Legal Adviser, Penang) for the Public Prosecutor.

Karpal Singh for the 1st respondent.

R. Rajasingam for the 2nd respondent.

Subash Chandran for the 3rd respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The three accused were tentatively charged with murder. A preliminary inquiry was held before the learned Senior President of the Sessions Court, Georgetown, Penang, sitting as a Magistrate on November 28, 1977. During the inquiry the prosecution produced a cautioned statement which was alleged to have been made by the third accused to a Police Inspector and which was recorded in writing. Counsel for the third accused objected to the production of the statement on the ground that the statement, though admissible at a trial, was inadmissible at a preliminary inquiry. The learned President ruled on December 14, 1977, that the statement was admissible and admitted it.

On application by counsel for the third accused, the learned judge called for the record of the proceedings and on December 16, 1977, using his revisionary power under section 35(1) of the Courts of Judicature Act, 1964, heard arguments from counsel including the learned Deputy Public Prosecutor and ruled that under section 113 of the Criminal Procedure Code the cautioned statement was not admissible at the preliminary inquiry, though it was admissible should he be subsequently tried in the High Court. He held that the word "trial' in that section

meant "actual trial", not "preliminary inquiry". Section 113 reads, and I italicize the significant word:

"113. (1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his *trial* and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that—

(a) no such statement shall be admissible or used as aforesaid—

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him."

The matter is important in this way. Without the cautioned statement there would have been no evidence before the learned President to justify him committing the accused for trial in the High Court. With the evidence, he would have been so justified.

Accordingly the Public Prosecutor applied under section 66(1) of the Courts of Judicature Act, 1964, to the High Court to reserve for the decision of the Federal Court the following questions of law of public interest:

1. Whether a statement recorded in accordance with section 113 of the Criminal Procedure Code which is intended to be produced at the trial before the High Court in support of the case for the prosecution is in law admissible evidence at the preliminary inquiry?

2. If the answer to question 1 is in the affirmative, whether it is the duty of the Magistrate in law to decide as to its admissibility?

Question 1.

We are of the opinion that the answer to question 1 is in the affirmative.

The arguments of counsel for the accused for resisting the admission of the statement have been well set out by the learned judge in his judgment and there is no need for us to repeat them. But while agreeing with Ong J. as he then was, that a preliminary inquiry is not a trial, as he decided in *Re Low Kuan Meng*,[1] we are of the opinion that that decision should be limited in this way, that while at a trial a magistrate can convict or acquit, at a preliminary inquiry he may not do so and that his duty there is limited either to discharging the accused or committing him for trial in the High Court. In our judgment, that decision cannot be extended, as contended by the defence, to make the word "trial" in section 113(1) of the Criminal Procedure Code to mean only a trial and not a preliminary inquiry. On the contrary, in our judgment, respectfully disagreeing with the learned judge it *does* include preliminary inquiry. It is absurd to suppose that evidence inadmissible at a preliminary inquiry is admissible at a trial in the High Court. In our judgment, evidence admissible at a trial is *a fortiori* admissible at a preliminary inquiry.

In ruling that the word "trial" in section 113 means inquiry or trial we are not unmindful of the fact that section 115(i) of the Code uses the words "inquiry *or* trial" and that sections 138, 140 and 173 use the word "trial".

In our judgment, the context in which the word "trial" is used in section 113, however, requires that the court should give it an extended meaning to include a preliminary inquiry.

The alleged statement was a confession made by the third accused whilst he was in the custody of a police officer and was not made to a judicial officer, and the learned judge was of the opinion that section 26 of the Evidence Act which reads as follows:—

"26. (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a President of a Sessions Court or Magistrate, shall be proved as against that person."

applied to render the statement inadmissible. With respect, that section is expressed to be "subject to any express provision contained in any written law". In our judgment, section 113 of the Criminal Procedure Code is such written law and is an exception expressly permitted by section 26 of the Evidence Act and therefore the alleged statement is admissible if it complies with section 113.

The only question before the learned President was whether the statement was evidence relevant to the charge and, if it was so, whether it was excluded by any provision of the law. If it was relevant to the charge and not excluded by law, then it was his clear duty to admit it. This is clearly set out by subsection (i) of section 139 of the Criminal Procedure Code which reads:

"139. (i) When the accused person is brought before him [at a preliminary inquiry] the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for."

Question 2.

The answer to question 2 is not easily expressed in one sentence and is as follows. Subject to what we say below, it is indeed the duty of the Magistrate in law to decide on the admissibility of the statement.

However, not all cautioned statements are admissible. A cautioned statement is admissible if and only

if it satisfies the conditions set out in section 113. In particular we mention two conditions: that it should be made to a police officer of or above the rank of Inspector, and that it was made voluntarily. If clearly the statement was made to an officer below the rank of Inspector, then the duty of the committing Magistrate is easy — he simply rejects it. But if the voluntariness of the statement is challenged, and in the unlikely event of the accused's counsel persisting, regardless of expense to his client, in having a trial within a trial, the learned Magistrate's duty is to listen patiently to the evidence of and submission by both sides, and if there is doubt as to the weight and quality of the evidence (as there is in most cases), he should refrain from assessing the evidence and instead simply commit the accused and leave the duty of resolving the doubt to the High Court Judge. We respectfully agree with what Bellamy J. said at page 239 in *Osman bin Abdullah*[2] as follows: —

"When all the evidence has been taken [at a preliminary inquiry], the Magistrate's duty simply is to enquire, has a *prima facie* case been made out against the accused by credible evidence? If the answer to this question is in the affirmative, then the Magistrate is bound to commit the accused for trial. On the other hand, if the answer is in the negative, the Magistrate is bound to discharge the accused, unless the evidence discloses an offence over which he has jurisdiction in which case he may either deal with it himself or order it to be tried by another Magistrate. It is no part of the enquiring Magistrate's duty to consider possible lines of defence to the charge which the accused may raise in the course of the inquiry or to decide whether there are sufficient grounds for convicting the accused. That is the function of the trial court. Adopting the language of Bachelor J. in *In re Bai Parvati*[3] it is a safe rule that where the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving the doubt and assessing the evidence should be left to the Court of a Judge."

Accordingly, we set aside the order of the learned judge and restore the order of the learned President admitting the cautioned statement.

Order accordingly.

Solicitors: *Karpal Singh & Co.; R. Rajasingam: Jag-Jit Singh & Subash Chandran.*

TRACTORS MALAYSIA BHD. v. KUMPULAN PEMBINAAN MALAYSIA SDN. BHD.

[F.C. (Raja Azlan Shah, Wan Suleiman and Chang Min Tat F.JJ.) June 1 and October 16, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 177 of 1977]

Hire-Purchase — Failure to pay instalments — Vehicle repossessed by owner — Whether transaction sale or hire-purchase — Claim for damages — Sale of Goods (Malay States) Ordinance, 1957, s. 19 — Hire Purchase Act, 1964, ss. 4 and 15.

Practice and Procedure — Application to strike out statement of claim — Proceedings in lieu of demurrer — R.S.C. 1957, O. 25.

Evidence — Contract reduced to writing — Evidence contradicting, varying, adding to or subtracting from terms — Evidence Act, 1950, s. 92.

This was an appeal from the decision of Abdul Hamid J., reported at [1978] 2 M.L.J. 113. In this case the parties had entered into an agreement relating to a second-hand caterpillar tractor. The agreement was in form a hire-purchase agreement in which the appellant agreed to let and the respondent agreed to hire the motor vehicle subject to the terms and conditions in the agreement and the Hire-Purchase Act, 1967. The respondent paid the deposit but later defaulted in the instalments. The appellant thereupon repossessed the vehicle but subsequently the respondent paid all the arrears and expenses and the hire-purchase agreement was revised. The respondents again fell into arrears and the appellants claimed the balance due on the agreement, damages and costs. The matter was settled and on the respondent paying to the appellant the payments outstanding on the purchase of the vehicle, the appellant transferred the ownership of the vehicle to the respondent. Subsequently the respondent commenced an action for damages against the appellant contending that the purchase of the vehicle was an outright purchase, the property in the vehicle passed immediately on the payment of the deposit, that thereafter the appellant had only a claim for the balance due and no right of re-possession; and therefore the exercise of repossession was wrong giving the respondent a claim for damages. The appellant applied in the High Court to strike out the claim of the respondent as disclosing no cause of action on the pleadings. The application was refused and the appellant appealed to the Federal Court.

Held, allowing the appeal: (1) on a proper and correct construction of the agreement between the parties, it was beyond argument that the intention between them was that the property in the vehicle was not to pass to the respondent until full payment had been made. It was therefore a hire-purchase agreement and until full payment had been made the appellant had the right to repossess the vehicle on breach of its terms by the respondent. The repossession was therefore not wrongful;

(2) the case was therefore on the undisputed facts and as a matter of the proper construction of the agreement and the application of the proper law, an eminently fit one for proceedings in lieu of demurrer under Order 25 Rules of the Supreme Court.

Cases referred to:-

(1) *Dunlop* v. *Selfridge* [1915] A.C. 847.
(2) *Reid* v. *Macbeth and Gray* [1904] A.C. 223.
(3) *Dennant* v. *Skinner* [1948] 2 K.B. 164.
(4) *The Parchim* [1918] A.C. 157.
(5) *Narasingerji Gyanagerji* v. *Ponuganti Parthasaradhi* (1924) 51 I.A. 305.
(6) *Moorgate Mercantile Co. Ltd.* v. *Finch & Anor.* [1962] 2 All E.R. 467.

FEDERAL COURT.

Wong Chong Wah for the appellant.

Jagjit Singh for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The short question in this appeal is whether the agreement entered into between the parties is a hire-purchase agreement as contended by the appellant-defendant or an outright sale on instalment terms as argued by the respondent-plaintiff. If it is a hire-purchase agreement, then by the terms of it the appellant would have been entitled to re-possess the vehicle on breach of any of the terms of the agreement and would not be liable for damages. If an outright sale, the property in the vehicle had passed to the purchaser and the purchaser would have a perfectly valid claim for wrongful re-possession.

In the High Court on an application to strike out the claim of the purchaser for damages for wrongful possession as disclosing no cause of action on the pleadings and having regard to the facts, the learned trial judge refused to do so. He therefore dismissed the application with costs. From that decision this appeal lies.

The vehicle concerned was a second-hand caterpillar tractor priced at $173,500. The price was such